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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY RAYMOND MOUNT,

Defendant and Appellant.

A151561

(Lake County  
Super. Ct. No. CR942511)

Billy Raymond Mount appeals from his convictions of second degree murder (Pen. Code, § 187, subd. (a); count one),<sup>1</sup> assault with a semiautomatic firearm (§ 245, subd. (b); count two), willfully and maliciously discharging a firearm from a motor vehicle (§ 26100, subd. (c); count three), felon in possession of a firearm (§ 29800, subd. (a)(1); count four), unlawful possession of a firearm (§ 29805; count five), and multiple enhancements, including personal and intentional discharge of a gun causing death (§ 12022.53, subd. (d)) and commission of the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

We agree with Mount that an amendment to section 12022.53, subdivision (h), requires remand so the trial court may consider striking the term imposed for the firearm enhancement. We will also strike the 10-year gang enhancement imposed on count one. Otherwise, we affirm.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

## FACTS

### A.

On July 2, 2015, Mount shot Steven Galvin on 35th Avenue in Clearlake. Galvin, also known as T-Bone, later died at the hospital from internal bleeding.

Clearlake Police Detective Ryan Peterson arrived at the scene when paramedics were treating Galvin. He asked Galvin who did this to him, and Galvin replied “Cyclops.” Peterson knew that Cyclops, or Commander Cyclops, was the gang moniker for a skinhead gang member named David Cox. The police arrested Cox and, during an interview, he denied shooting Galvin but traced the name “Billy Mount” in spilled water on the table. Cox was eliminated as a suspect when his alibi was confirmed.

Evidence showed the shooting was gang related. Cox testified at Mount’s trial under a grant of use immunity. He admitted being a drug user, a skinhead, and having been previously convicted of several felonies. He also admitted being a “hardcore” skinhead but attempted to explain his involvement as “a way of life” and “based on music.” After moving to Clearlake, Cox organized a new group of skinheads that included Mount and a handful of other individuals. Cox denied ordering Mount to kill Galvin but admitted “[one] percent” responsibility. Two months before the shooting, Cox accused Galvin of stealing his tablet computer. Although Galvin promised to repay Cox, Galvin failed to do so. Cox tried to physically fight and intimidate Galvin on several occasions. During an argument with Galvin, Cox brandished a revolver similar to the one used to kill Galvin. Cox told another gang member it was “boots down” with Galvin, which meant the others were to “stick up for [Cox].” Other gang members warned Galvin to leave Clearlake and to stay out of “the Avenues,” the neighborhood in which he was shot. Before his death, Galvin told his girlfriend, “when you mess with one of those white boys you mess with them all.”

Hours before the July 2, 2015 shooting, Mount and Cox had a heated exchange at a house on Maple Street. Cox was angry with Mount for disrespecting Cox’s ex-girlfriend, Crystal Larson. Mount apologized to Larson and left in a white pickup truck. About 20 minutes after the shooting, Mount called Cox. Cox initially told police Mount

said, “I seen T-bone. I got him.” Cox later told police, and testified again at trial, that Mount told him, “I seen T-Bone. Call Rusty.” Cox later called Larson, who was also a gang member, and told her, “I think Billy just shot T-Bone for me.”

Independent witnesses to the shooting said they heard men arguing just before the shots were fired. None of them identified Mount as the shooter, but they described the shooter as a bald male with a goatee and no facial tattoos—a description that more closely resembles Mount than Cox, who has facial tattoos. Witnesses said the shooter fled in a white pickup truck.

Sean Whiteman owned such a truck and identified Mount as the shooter. Whiteman testified that, on the day of the shooting, he gave Mount and Whiteman’s friend, Jeremy Green, a ride to the Maple Street house, which was known for drug sales. Green and Mount, who both used heroin and methamphetamine regularly, went inside. Green bought some heroin. He observed Mount talking with Cox. Green could not hear what they said, but Mount appeared “distressed” and “angry.” Whiteman and Mount left the house on Maple Street in the white truck, without Green, and Mount directed Whiteman to drive along 35th Avenue. When they saw Galvin walking down the street, Mount asked Whiteman to pull over. As Galvin approached the passenger side of the truck, Mount fired the first shot. Galvin turned away, and Mount fired a second shot into Galvin’s back. Mount said, “Let’s get the hell out of here.” When Whiteman asked Mount why he shot Galvin, Mount responded that Galvin was a child molester. Green later told police Mount made a similar admission to him.

Mount directed Whiteman toward Old Airport road, where Mount exited the truck and hid the gun “under something.” Whiteman later directed police to the area, where the police found a .22- caliber Ruger concealed inside a black bag stashed in a culvert. Shell casings at the scene of the murder matched those from the weapon.

Peterson testified as a gang expert about California’s skinhead gangs. He had contact with no fewer than six skinhead gang members in Lake County. According to Peterson, the Clearlake skinhead gang is a criminal street gang because the group consists of more than three people, who use common signs and symbols (swastikas, the number

88, and lighting bolts), and commit documented criminal activity. Peterson investigated skinheads for murder, drug sales, weapons possession, assaults, and graffiti. He considered crime their primary activity. He identified evidence of two predicate offenses and opined, “criminal activity . . . enhances the status of the gang and the gang members. [¶] [T]he drug sales and weapons sales . . . [provide] money for the gang and the gang members. For the violent acts, murder, assault with a deadly weapon, mayhem, witness intimidation, things of that nature, it enhances their status[, and] . . . other gangs won’t want to retaliate against them because of fear of what’s going to happen. And also . . . citizens don’t want to say anything out of fear of what would happen for their own safety as well.”

Police confirmed Cox is a “Modesto Hardcore” skinhead. Before Galvin’s death, Mount had not been confirmed as a skinhead gang member. Peterson opined, based on Mount’s tattoos, his association with other gang members, and the content of certain communications, Mount was a skinhead gang member associated with both the Clearlake skinheads and Volksfront—a “skinhead organization” started in Oregon that uses the same or similar signs and symbols as other skinhead groups. Lloyd Wallace, a correctional sergeant in the California Department of Corrections and Rehabilitation’s Office of Correctional Safety Gang Intelligence, testified that California’s skinhead street gangs often cooperate and that the gangs are often subservient to the Aryan Brotherhood prison gang.

## **B.**

The jury acquitted Mount of first degree murder but convicted him of second degree murder and all other counts. The jury also found true the following enhancement allegations: the murder was perpetrated by discharging a firearm from a motor vehicle, intentionally at another person, with the intent to inflict great bodily injury and death (§§ 190, subd. (d), 190.2, subd. (a)(21)); all counts were committed for the benefit of a criminal street gang and with intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)); Mount intentionally killed Galvin while Mount was an active participant in a criminal street gang and the murder was committed to

further the activities of the gang (§ 190.2, subd. (a)(22)); and Mount personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (b)–(d)).

Mount was represented at trial by Andrea Sullivan. After the verdict, Mount retained a new attorney, who filed a motion for new trial, alleging ineffective assistance by Sullivan. After an evidentiary hearing, the trial court denied the motion.

Mount was sentenced to an aggregate prison term of 17 years determinate plus 45 years to life. His sentence is comprised of 20 years to life for second degree murder (§ 190, subd. (d)), a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)) to murder, and a 10-year term for the gang enhancement (§ 186.22, subd. (b)(1)(C)). The upper term of three years was imposed for count four, plus a four-year term for the gang enhancement (§ 186.22, subd. (b)(1)(A)). The trial court imposed but stayed punishment (§ 654) on all other counts and enhancements. Mount filed a timely notice of appeal.

## **DISCUSSION**

### **A.**

We reject Mount’s contention that his trial counsel was ineffective because she did not argue to the jury the Clearlake skinheads are not a criminal street gang within the meaning of section 186.22, subdivision (f).

Under both the United States and California Constitutions, a criminal defendant has the right to the assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684–686; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) “Where, as here, the trial court has denied a motion for a new trial based on an ineffective assistance claim, we apply the standard of review applicable to mixed questions of law and fact, upholding the trial court’s factual findings to the extent they are supported by substantial evidence, but reviewing de novo the ultimate question of whether the facts demonstrate a violation of the right to effective counsel.” (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 590–591, disapproved on other grounds by *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 314–315.)

To establish ineffective assistance of counsel, a defendant must show (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness, under prevailing professional norms, and (2) the deficient performance was prejudicial, rendering the results of the trial unreliable or fundamentally unfair. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 688, 692; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 216–217.) “[W]e begin with the presumption that counsel’s actions fall within the broad range of reasonableness, and afford ‘great deference to counsel’s tactical decisions.’ [Citation.] Accordingly, we have characterized defendant’s burden as ‘difficult to carry on direct appeal,’ as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had ‘ “no rational tactical purpose” ’ for an action or omission.” (*People v. Mickel* (2016) 2 Cal.5th 181, 198.) “ “[I]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be rejected.’ [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

The record before us does not disclose why Sullivan decided to omit from her closing an argument the Clearlake skinheads were not a criminal street gang. But she argued to the jury that the gang leader, David Cox, was responsible for the murder rather than Mount. We agree with the People that Sullivan could have made a reasonable tactical decision not to challenge the gang evidence and instead sought to use it to her advantage to suggest Cox shot Galvin, to rebut the prosecution’s evidence that Cox was merely a blowhard, and to suggest other members of the gang were lying to protect their leader. As the People submit, a defense argument that the Clearlake skinheads were not a criminal street gang within the meaning of section 186.22, subdivision (f), “would have had very little upside, and would have considerably dulled [defense counsel’s] . . . effort to get an outright acquittal.” Because Sullivan may have had valid tactical reasons for her conduct, Mount has failed to establish ineffective assistance of counsel on appeal.

(*People v. Lucas* (1995) 12 Cal.4th 415, 436 [defendant’s burden to demonstrate trial counsel’s inadequacy].)

## B.

Mount contends the four-year gang enhancement (§ 186.22, subd. (b)(1)(A)) imposed on count four (possession of a firearm) should have been stayed. He argues section 654 barred the trial court from applying the same enhancement to two crimes—possession of a firearm and murder—because he had the same objective for both possessing the gun and using it, i.e., to shoot Galvin. His argument misses the mark.

Section 654 bars multiple punishments for a single criminal act.<sup>2</sup> The Supreme Court examined section 654’s application to enhancements in *People v. Ahmed* (2011) 53 Cal.4th 156 (*Ahmed*). The court explained that enhancements differ from substantive crimes, and this affects how section 654 applies to enhancements. (*Ahmed*, at p. 163.) “Provisions describing substantive crimes . . . generally define criminal acts. But enhancement provisions do not define criminal acts; rather, they increase the punishment for those acts. They focus on *aspects* of the criminal act that are not always present and that warrant additional punishment.” (*Ibid.*, italics omitted.)

Accordingly, section 654 does not apply when the same type of enhancement is imposed for two separate substantive offenses “[s]o long as the conduct giving rise to the convictions of separate substantive offenses is divisible or arises from separate criminal acts.” (*People v. Wooten* (2013) 214 Cal.App.4th 121, 131 (*Wooten*).) In *Wooten*, the trial court applied the same enhancement (great bodily injury) to convictions of both attempted murder and forced oral copulation of the same victim. The Court of Appeal affirmed, observing that the criminal acts were separate and distinct: the defendant first beat and sexually assaulted the victim then, after she tried to escape, he attempted to murder her. (*Id.* at pp. 132–133.) “[I]f section 654 does not bar punishment for two

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<sup>2</sup> “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).)

crimes, then it cannot bar punishment for the same enhancements attached to those separate substantive offenses.” (*Id.* at p. 130.)

Here, as in *Wooten*, the trial court imposed the same gang enhancement to two separate substantive offenses. Indeed, Mount concedes he could be punished separately for both murder and possession of a firearm by a felon. This concession is fatal to his argument.

Mount mistakenly relies on two cases, *People v. Garcia* (2007) 153 Cal.App.4th 1499 and *People v. Akins* (1997) 56 Cal.App.4th 331, for the proposition that “[t]wo separate gang enhancements are only proper if the defendant had multiple objectives.” Consistent with *Ahmed* and *Wooten*, both *Garcia* and *Akins* rejected section 654 arguments because the enhancements at issue focused on separate criminal acts. (See *Garcia*, at p. 1514 [holding that the crime of participating in a criminal street gang under § 186.22, subd. (a) is distinct from the underlying felony (possession of loaded firearm in public) committed to benefit a criminal street gang]; *Akins*, at p. 339 [upholding gang enhancements applied to robberies and assaults that involved “separate victims, were separated in time and distance, and were separate robberies”].)

Section 654 does not require a stay of the gang enhancement to count four.<sup>3</sup>

### C.

We agree with Mount that remand is required for the trial court to decide whether to strike the firearm use enhancement.

The jury found true an enhancement allegation that Mount personally and intentionally discharged a firearm causing Galvin’s death within the meaning of section 12022.53, subdivision (d). Under the law in effect at the time of Mount’s sentencing, the trial court imposed a mandatory consecutive term of 25 years to life for

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<sup>3</sup> To the extent Mount attempts to raise a substantial evidence challenge to the jury’s “true” finding on count four’s gang enhancement, he has forfeited the argument, and we do not address it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [reviewing court may disregard points missing cogent legal argument]; *300 DeHaro Street Investors v. Department of Housing & Community Development* (2008) 161 Cal.App.4th 1240, 1257 [reviewing court may disregard argument not set forth under separate heading].)

the enhancement. (Former § 12022.53, subd. (h), as amended by Stats. 2010, ch. 711, § 5; accord, *People v. Franklin* (2016) 63 Cal.4th 261, 273 [no statutory discretion but to impose consecutive term of 25 years to life for firearm enhancement].)

While Mount’s appeal was pending, section 12022.53, subdivision (h) was amended to give trial courts discretion to strike or dismiss firearm enhancements in furtherance of justice. (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018.) Mount contends the trial court should have an opportunity to consider striking the firearm enhancement. Although the People concede the amendment applies retroactively to nonfinal judgments such as Mount’s (see, e.g., *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424), they contend a remand would serve no purpose because the trial court’s imposition of consecutive sentences and aggravated terms necessarily indicates it would not have struck the firearm enhancement even if it had the discretion to do so at the time of sentencing (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896).

At the time of Mount’s sentencing, the trial court noted it had “very limited [sentencing] choices.” Accordingly, we cannot say the record in this case “clearly indicate[s]” the trial court would not have exercised its discretion to strike the section 12022.53 enhancement. (*People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896; *People v. McDaniels, supra*, 22 Cal.App.5th at p. 425 [remand *required* unless record shows trial court clearly indicated it would not have stricken firearm enhancement even if it had discretion to do so].) We conclude the trial court should have an opportunity to exercise its discretion.

#### **D.**

Finally, Mount contends, and the People concede, the 10-year gang enhancement on murder should be stricken under *People v. Lopez* (2005) 34 Cal.4th 1002. As the *Lopez* court explained, “section 186.22, subdivision (b) establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) . . . imposes a 10-year enhancement when such a defendant commits a violent felony. Section 186.22(b)(1)(C) does not apply, however, where the violent felony is ‘punishable by imprisonment in the state prison for

life.’ ( . . . § 186.22, subd. (b)(5).) Instead, section 186.22, subdivision (b)(5) . . . applies and imposes a minimum term of 15 years before the defendant may be considered for parole.” (*Lopez*, at p. 1004.) We therefore direct the trial court to modify the judgment to delete the 10-year gang enhancement and to order the 15-year minimum term for parole eligibility pursuant to section 186.22, subdivision (b)(5).<sup>4</sup>

#### **DISPOSITION**

Mount’s sentence for the firearm enhancement imposed on count one is reversed. The trial court is instructed to exercise its discretion under section 12022.53, subdivision (h). If the trial court elects not to strike or dismiss the firearm enhancement, it shall resentence Mount for the firearm enhancement (§ 12022.53, subd. (d)). The trial court is further directed to prepare amended abstracts of judgment (1) striking the 10-year gang enhancement imposed on count one under section 186.22, subdivision (b)(1)(C) (erroneously entered on the abstract of judgment as a 10-year enhancement for prior prison terms (§ 667.5, subd. (b))); (2) imposing the 15-year minimum term for parole eligibility required by section 186.22, subdivision (b)(5); and (3) correcting clerical errors identified in footnote 4. The amended abstracts of judgment shall be forwarded to the appropriate agencies. In all other respects, the judgment is affirmed.

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<sup>4</sup> Mount’s abstracts of judgment contain clerical errors not addressed by the parties. On Judicial Council Forms, form CR-292 for indeterminate sentencing on count one, section 2 omits a stayed section 12022.53, subdivision (b) enhancement, and section 3 misidentifies the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) as a prior prison term enhancement under section 667.5, subdivision (b). On Judicial Council Forms, form CR-290 for determinate sentencing on counts two through five, section 3 also misidentifies gang enhancements as prior prison term enhancements under section 667.5, subdivision (b). Two section 186.22, subdivision (b)(1)(C) gang enhancements were imposed and stayed in connection with counts two and three; a four-year section 186.22, subdivision (b)(1)(A) gang enhancement was imposed in connection with count four; and another section 186.22, subdivision (b)(1)(A) gang enhancement was imposed and stayed in connection with count five. Although the error related to the gang enhancement on count one will be otherwise corrected by our disposition, we will order both abstracts of judgment corrected in all respects.

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BURNS, J.

WE CONCUR:

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JONES, P. J.

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NEEDHAM, J.

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